A

Chin Yoke Yin v Tan Theam Huat

B HIGH COURT (KUALA LUMPUR) — PETITION NO 33–894–05 OF 2013
NORAINI ABDUL RAHMAN J
28 AUGUST 2015

C *Family Law — Divorce — Ancillary relief — Allegation of domestic violence by petitioner — Whether damages for domestic violence may be allowed — Assessment of damages for domestic violence — Maintenance for petitioner and daughter — Law Reform (Marriage and Divorce) Act 1976*

D *Family Law — Divorce — Cross-petition — Proof of — Cross-petitioner choosing not to give evidence*

E *Family Law — Divorce — Matrimonial property — Entitlement of parties — Evaluation of contribution towards acquisition — Difficulty in ascertaining exact percentage of monetary contribution — Whether property to be equality divided — Law Reform (Marriage and Divorce) Act 1976 s 76*

F The divorce petition was filed by the petitioner wife against the respondent husband. The respondent husband cross-petitioned for divorce. The petitioner wife had ten witnesses whilst the respondent husband did not give any evidence. The respondent had moved out of the matrimonial home alleging domestic violence by the petitioner. The marriage was dissolved and the decree
G nisi for the divorce was made decree absolute immediately. The petitioner sought damages for domestic violence whilst the respondent submitted that damages could not be awarded under the Law Reform (Marriage and Divorce) Act 1976 and that the court did not have jurisdiction to hear this case as regards domestic violence.

H **Held**:

(1) The High Court has jurisdiction to hear matrimonial matters as it comes within the civil jurisdiction of a High Court. Damages for domestic
I violence could also be dealt with by the court since the intitulement of the suit mentioned 'Dalam perkara Seksyen-Seksyen 2 dan 10 Akta Keganasan Rumah Tangga 1994' (see paras 18–19).

(2) The evidence showed that there was domestic violence. Cases of injury due to motor vehicle accident could be cited in assessing compensation for injuries caused by domestic violence (see para 22).

(3) RM4,000 was allowed as monthly maintenance for the petitioner to commence from February 2013 until she died or remarried. RM1,500 was allowed as monthly maintenance for the daughter starting from February 2013 until she reached the age of 18 years (see paras 27–28).

(4) The court will have to evaluate the contribution of each party towards the acquisition of assets bought during the subsistence of the marriage. In this case, it was difficult to ascertain the percentage of monetary contribution by each party in the acquisition of the matrimonial assets. The petitioner gave evidence that the matrimonial assets were derived from their business income. Because of the inability to determine percentage of contribution, the court relied on s 76 of the Law Reform (Marriage and Divorce) Act 1976 which provides that the court shall incline towards equality of division (see paras 31–33).

(5) The petitioner and other witnesses had given evidence to support her claim. The respondent however chose not to give evidence even though he was present in court throughout the trial. He had intimate knowledge about the matrimonial assets and he could have taken the stand to explain his side of the story. This he did not do. Therefore the court had to believe the evidence of the petitioner (see para 39); *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 referred; *Takako Sakao (f) v Ng Pek Yuen (f) and another* [2009] 6 MLJ 751 referred.

(6) The cross-petition by the respondent could not be dealt with because he chose not to give evidence as regards all the allegations made by him (see para 49).

[Bahasa Malaysia summary

Petisyen penceraian itu telah difailkan oleh pempetisyen isteri terhadap responden suami. Responden suami telah mempetisyen silang untuk penceraian. Pempetisyen isteri mempunyai sepuluh saksi manakala responden suami tidak memberi apa-apa keterangan. Responden telah keluar daripada rumah kelamin mendakwa keganasan rumah tangga oleh pempetisyen. Perkahwinan dibubarkan dan dekri nisi untuk penceraian telah dibuat dekri mutlak serta-merta. Pempetisyen memohon ganti rugi untuk keganasan rumah tangga manakala responden mengemukakan bahawa ganti rugi tidak boleh diawardkan di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Penceraian) 1976 dan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar kes itu berkenaan keganasan rumah tangga.

Diputuskan:

(1) Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar perkara perkahwinan kerana ia datang dalam bidang kuasa sivil Mahkamah Tinggi. Ganti rugi untuk keganasan rumah tangga boleh juga ditangani oleh mahkamah memandangkan *intitulement* guaman menyebut 'Dalam perkara Seksyen-Seksyen 2 dan 10 Akta Keganasan Rumah Tangga 1994' (lihat perenggan 18–19).

(2) Keterangan menunjukkan bahawa terdapat keganasan rumah tangga. Kes kecederaan disebabkan oleh kemalangan motokar boleh digunakan dalam mentaksirkan ganti rugi untuk kecederaan disebabkan oleh keganasan rumah tangga (lihat perenggan 22).

(3) RM4,000 dibenarkan sebagai nafkah bulanan untuk pempetisyen bermula daripada Februari 2013 sehingga dia meninggal dunia atau berkahwin semula. RM1,500 dibenarkan sebagai nafkah bulanan untuk anak perempuannya bermula daripada Februari 2013 sehingga dia mencapai umur 18 tahun (lihat perenggan 27–28).

(4) Mahkamah akan perlu untuk menilai sumbangan setiap pihak terhadap pemerolehan aset yang dibeli sewaktu sara hidup perkahwinan. Dalam kes ini, ia adalah sukar untuk memastikan peratus wang sumbangan oleh setiap pihak dalam pemerolehan harta perkahwinan. Pempetisyen mengemukakan keterangan bahawa harta perkahwinan berpunca daripada pendapatan perniagaan mereka. Kerana ketidakupayaan untuk menentukan peratus sumbangan, mahkamah bergantung kepada s 76 Akta Undang-Undang Pembaharuan (Perkahwinan dan Penceraian) 1976 yang mana memperuntukkan bahawa mahkamah akan memihak kepada kesamarataan pembahagian (lihat perenggan 31–33).

(5) Pempetisyen dan saksi lain telah memberikan keterangan untuk menyokong tuntutannya. Responden walau bagaimanapun memilih untuk tidak memberikan keterangan walaupun dia hadir dalam mahkamah sepanjang perbicaraan. Dia mempunyai pengetahuan intim tentang harta perkahwinan dan dia boleh berdiri di hadapan mahkamah untuk menjelaskan cerita pada pihaknya. Ini tidak dilakukan olehnya. Oleh itu mahkamah terpaksa mempercayai keterangan pempetisyen; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 dirujuk; Takako Sakao (f) v Ng Pek Yuen (f) and another [2009] 6 MLJ 751* dirujuk (lihat perenggan 39).

(6) Petisyen silang oleh responden tidak boleh ditangani kerana dia memilih untuk tidak memberi keterangan berkaitan kesemua dakwaan dibuat olehnya (lihat perenggan 49).]

Notes

For cases on ancillary relief, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4044–4050.

For cases on divorce in general, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3982–4324.

For cases on matrimonial property, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4278–4279.

Cases referred to

Crawford and others v Financial Institutions Services Ltd [2005] UKPC 40, PC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

Lee Mon Seng & Anor v Jeffery Ak Enggut & Anor [2011] MLJU 1179, HC (refd)

Nordin bin A Kadir lwn Mohd Faiz Izwan bin Jamaludin (tindakan ini dibawa oleh Puan Jama'ayah bt Mohamed sebagai ibu kandung dan sahabat wakil yang sah) dan satu lagi [2013] 8 MLJ 14, HC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)

Tham Croy Chee v Tan Lai Hoon & Young King Hai [2014] 5 LNS 1 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 53, 54, 76

Honey Tan (Chew Siew Ting and Arina Ong Xin Yi with her) (Tan Law Practice) for the petitioner.

Christene Tee (Bernard Scott, KC Hue and Siva Sargaran Nadarajah with him) (CC Ng & Assoc) for the respondent.

Noraini Abdul Rahman J:

[1] This is a divorce petition by the petitioner wife against the respondent husband. The respondent husband cross-petition for the divorce.

[2] I heard the case at full trial.

[3] The petitioner wife had ten witnesses. The respondent husband did not give any evidence. There is only one witness who testified regarding sale of certain matrimonial properties.

[4] As some of the facts are not in dispute, I am reproducing the facts of the case.

21 November 1985	-	Petitioner and respondent went through a tea ceremony.
9 April 1988	-	The marriage was registered at the Jabatan Pendaftaran Negara Wilayah Persekutuan KL (Wisma Kim Seah).
2006	-	Respondent moved out of matrimonial home.
8 June 2012	-	Alleged domestic violence by petitioner against respondent.
9 June 2012	-	Police report lodged by petitioner at Jalan Dang Wangi (Exh P5).
30 April 2013	-	Date of sale and purchase agreements of four properties.
10 May 2013	-	Divorce petition filed by the petitioner.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE

[5] Section 53 of the Law Reform (Marriage and Divorce) Act 1976 provides:

> 53 Breakdown of marriage to be sole ground for divorce
>
> (1) Either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down.
>
> (2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

[6] Therefore, from 1976 onwards, the only ground for divorce is that the marriage has irretrievably broken down.

[7] And the courts had to inquire into the facts alleged as causing or leading to the breakdown of marriage.

[8] Section 54 provides for the circumstances which lead to the breakdown of the marriage.

[9] Reproduced below is s 54 of the LRA.

> 54 Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

(2) In considering whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

[10] The petitioner therefore have to prove that there were circumstances which led to the irretrievable breakdown of the marriage. However, the respondent at para 26 of his 'Jawapan Kepada Pempetisyen Terpinda' said the following:

... dan (Responden) hanya membenarkan Permohonan Pempetisyen di perenggan 21.1.

[11] Paragraph 21.1 is the petitioner's prayer 'that the marriage be dissolved and for the decree nisi for divorce to be made absolute immediately'.

[12] The respondent also agreed prayers in paras 21.2 and 21.3.

[13] I reproduce below the three prayers that the respondent agreed:

21.1 that the marriage may be dissolved and for the decree nisi for divorce to be made absolute immediately;

21.2 that the Petitioner be given sole guardianship, custody, care and control of Tan Hwee Yeing (NRIC No: 990426–14–5342);

21.3 that the Respondent be given reasonable access to Hwee Yeing subject to the wishes of Hwee Yeing.

[14] Therefore, prayer 21.1 is allowed. The marriage is dissolved and the decree nisi for the divorce is made decree absolute immediately.

[15] I also allow the petitioner's prayer for paras 21.2 and 21.3.

[16] I would like to state here that although the respondent had agreed to the divorce and that it be made absolute immediately, the petitioner nevertheless gave evidence to prove the irretrievable breakdown of marriage as in her witness statement.

DOMESTIC VIOLENCE

[17] Counsel for the petitioner had submitted that the petitioner can claim damages for domestic violence.

[18] Counsel for the respondent submitted that damages could not be awarded under the Law Reform (Marriage and Divorce) Act 1976 and that this court does not have jurisdiction to hear this case as regards domestic violence. With respect, I disagree. I do have jurisdiction to hear matrimonial matters as it comes within the civil jurisdiction of a High Court.

[19] I am of the opinion that damages for domestic violence can be dealt with by this court. If one looks at intitulement of this suit, it is mentioned that 'Dalam perkara ss 2 dan 10 Akta Keganasan Rumah Tangga 1994'.

[20] Going into the facts and evidence of the case, I find that there was domestic violence.

[21] Reproduced below are the relevant sections of the Domestic Violence Act 1994.

> domestic violence means the commission of one or more of the following acts:
>
> (a) willfully or knowingly placing, or attempting to place, the victim in fear of physical injury;
>
> (b) causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;
>
> (c) [...]
>
> (e) causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;
>
> (f) causing psychological abuse which includes emotional injury to the victim; [...]
>
> by a person, whether by himself or through a third party, against –
>
> (i) his or her spouse [...]
>
> Compensation
>
> 10 (1) Where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court hearing a

claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable.

(2) The court hearing a claim for such compensation may take into account –

(a) the pain and suffering of the victim, and the nature and extent of the physical or mental injury suffered;

(b) the cost of medical treatment for such injuries;

(c) any loss of earnings arising therefrom;

(d) the amount or value of the property taken or destroyed or damaged;

(e) ... ;

[22] Counsel for the petitioner admitted that there are no reported cases of compensations in cases of domestic violence. Hence, she cited cases of injury due to motor vehicle accident. Counsel for the respondent disagree with the submission that compensation could be based on accident cases. I agree with counsel for petitioner because, looking at it objectively there were injuries, and it doesn't matter how it was caused either by motor vehicle accident or domestic violence.

[23] During the trial, there were evidence that domestic violence occurred many times during the marriage. However, I am only going to award compensation where there was medical check up and report. Two doctors gave evidence that the petitioner sought treatment in the Selayang Hospital. Dr Noor Aini Misnon from Selayang Hospital gave evidence that the petitioner was injured. It was found in the laporan perubatan (medical report) Hospital Selayang (exh P6) that the petitioner suffered the following:

Sejarah (History): (Including Presenting Complaints. History of Presenting Complaints, Past Medical History, Family History, Social History and Occupational History, Review of systems, Medical Records reviewed)

This 54 year old Chinese female presented to the Emergency Department on the above date following an alleged assaulted by her husband yesterday 8/6/12 around 9 am. Her husband was having affair with other woman. She went to husband's work place (at the hotel) and notices her husband with other woman in the hotel room. Her husband pushed her at 3 different places, grabbed her Upper Limb and pushed backward. He did not hit her or kick her.

Pemeriksaan Fisikal(Physical Examination) :

(Including general assessment, Eye, ENT, oral cavity, Respiratory System, Cardiovascular System, Abdomen, Genitourinary, Central Nervous System, Musculoskeletal, Mental Health Status and Others).

On arrival to the department the patient was alert, conscious. Her vital signs are stable. On examinations :

[95] abrasion wound at right elbow and right wrist

A [95] abrasion wound about 20 cent coin at left elbow

[95] tenderness at left thigh region remaining examination was unremarkable

Other systemic review was unremarkable.

B Keputusan ujian makmal dan radiology (Summary of investigations):

Nil

Diagnosis (Diagnosis):

Soft tissue injury

C Rawatan (Treatment):

She was discharged with medications

[24] Based on the cases of *Lee Mon Seng & Anor v Jeffery Ak Enggut & Anor* D [2011] MLJU 1179, *Nordin bin A Kadir lwn Mohd Faiz Izwan bin Jamaludin (tindakan ini dibawa oleh Puan Jama'ayah bt Mohamed sebagai ibu kandung dan sahabat wakil yang sah) dan satu lagi* [2013] 8 MLJ 14 and *Tham Croy Chee v Tan Lai Hoon & Young King Hai* [2014] 5 LNS 1, I am awarding compensation of RM4,000 to the petitioner to be paid by the respondent.

E

MAINTENANCE

[25] I heard submission on maintenance by both counsels. Petitioner in her witness statement said:

F ...

P: For the past 20 years before the filing of this Divorce Petition, I was allowed to sign cheques in respect of the Respondent's OCBC Bank Bhd, Petaling Jaya branch account no 7071001805 (OCBC PJ Account)i. I G would normally utilize about RM5,000/= for myself, the children and the households expenditures. ...

[26] In her pleading at para 11.2, she pleaded that she was:

H 11.2 able to sign cheques for the respondent's account number 7071001805 in the Petaling Jaya branch of OCBC Bank Berhad (the OCBC PJ Account). She had been signing the cheques for around 20 years. She would use approximately RM5,000 per month for herself, the children and the household; and

I

[27] Since the RM5,000 is used by the petitioner for the maintenance of herself and her children, I am now allowing RM4,000, as monthly maintenance for herself, the petitioner, to commence from February 2013 until she die or remarry.

[28] I am allowing RM1,500 as monthly maintenance for the daughter Hwee Yeing starting from February 2013 until she reaches the age of 18 years. **A**

DIVISION OF MATRIMONIAL ASSETS

[29] Counsel for the respondent had submitted that the properties should be divided into 'sole property' or 'joint property'. I think there is a need for me to refer to the LRA to determine the division of properties. **B**

[30] Section 76 of the LRA provides the meaning of matrimonial assets as follows: **C**

76 Power for court to order division of matrimonial assets.

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. **D**

(2) In exercising the power conferred by subsection (1) the court shall have regard to –

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; **E**

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage, **F**

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale. **G**

(4) In exercising the power conferred by subsection (3) the court shall have regard to –

H

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage;

I

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

[31] Hence, following the provision of the law, this court will have to evaluate the contribution of each party towards the acquisition of those assets bought during the subsistence of the marriage. In this case, this court find it difficult to ascertain the percentage of monetary contribution by each party in the acquisition of the matrimonial assets.

[32] The petitioner gave evidence that the matrimonial assets were derived from 'our business income'.

[33] Because of the inability to determine percentage of contribution, I am relying on s 76 of the LRA where it is provided that 'subject to those consideration, the court shall incline towards equality of division'.

[34] It is to be noted that the respondent husband did not give evidence even though he was in court throughout the trial. No reason was given as to why he chose not to take the stand in the witness box.

[35] In the Supreme Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, Gopal Sri Ram JCA (as he then was) said:

> At the trial, the only witness called by the appellants upon the question of fault was the investigating officer who, inter alia, explained the sketch plan of the scene of the accident, which he had prepared. At the close of the appellant's case, counsel for the respondents informed the court that the first respondent was not available to give evidence because he was out of the country. He then made a statement to the effect that he was closing his case.
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> ...
>
> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[36] Again in another Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, His Lordship Gopal Sri Ram said the following:

> Taking the first issue, it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's caveat ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted she refrained from doing that. On the facts of this case, there were two persons who were privy to the terms of the arrangement in question and the details of the payments made and the purpose for which they were made: the appellant and the first respondent. The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below.

[4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.' There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts

which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

[37] Brooke LJ then went on to say this:

From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[38] The other case is *Crawford and others v Financial Institutions Services Ltd* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the advice of the Privy Council said:

It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

[5] *Sarkar on Evidence* (16th Ed) at p 1837 states:

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbaksh v Gurdial* AIR 1927 PC 230.

[39] In our case, the petitioner and other witnesses had given evidence to support her claim. As was said earlier the respondent chose not to give evidence even though he was present in court throughout the trial. He had intimate knowledge about the matrimonial assets and he could have taken the stand to explain his side of the story. This he did not do. Therefore I am bound by the decisions of the two cases cited above and I have to believe the evidence of the petitioner.

[40] At this juncture, I must also mention that Lam Wan ('DW1') gave evidence on behalf of the respondent but only as regards four matrimonial properties. I will deal with this later in this judgment.

[41] As is the normal practice, parties were given direction at case management stage to file documents. In this case, parties were directed to file 'Penyataan Fakta-Fakta Yang Dipersetujui' ('agreed facts'). Reproduced below are the relevant part of the agreed facts (Bundle G):

Matrimonial Assets

12 The following are matrimonial assets:

12.1 the Matrimonial Home;

12.2 the property held under Geran No Hakmilik 22319, Lot 48701, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur and bearing the postal address of No 31, Jalan 9/18R, Taman Mastiara, 51200 Kuala Lumpur;

12.3 the property held under Geran No Hakmilik 44216, Lot No 1488, Seksyen 41, Bandar dan Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur and bearing the postal address of No 61, Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur;

12.4 the property held under Geran No Hakmilik 68082, Lot No 2531, Seksyen 41, Bandar dan Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur and bearing the postal address of No 73 and No 75, Jalan Raja Muda Aziz, 50300 Kuala Lumpur;

12.5 a half undivided share of the property held under HS (M) 3070, PT 2532, Mukim Gali, Daerah Raub, Negeri Pahang Darul Makmur;

12.6 the property held under Lot 2981, Tempat Sungai Kenong, Mukim Tras, Daerah Raub, Negeri Pahang Darul Makmur;

12.7 the business and / or shares in New Merdeka Hotel;

12.8 the business and / or shares in Hotel Tiara;

12.9 the business and / or shares in Asrama Megaria;

12.10 insurance policies as follows:

12.10.1 AIA insurance policy number 10350389 where the assured is Tan Hwee Neng.

Dated this 19th day of March 2014

(sgd)	(sgd)
.....	.....
Messrs Tan Law Practice	Messrs CC Ng & Associates
Solicitors for the Petitioner	Solicitors for the Respondent

[42] Counsel for the respondent in his submission wanted to renegade on this. However, these are documents prepared and signed by both parties. Hence, I find that the list reproduced from the agreed facts are matrimonial assets.

[43] Therefore, in accordance with s 76 of the LRA, those matrimonial properties are to be divided in equal shares between the petitioner and respondent.

[44] As I had stated earlier, as regards the sale of matrimonial home, Lot 1837, No 61 and Nos 73 and 75, there was one witness for the respondent who had come to give evidence. She is Lam Wan.

[45] I would like to reproduce relevant part of her witness statement because it tell us the story of how respondent met his friends that led him to sell the four properties mentioned earlier to a company called Dazzling Oscar Sdn Bhd and that his four friends are the shareholders.

> 2 What is your relationship with Mr Tan?
>
> In 2008 about 8 years ago, I joined a Dharma class on Buddhism taught by Mr. Tan at the Bandar Sg Long Buddhist Society. I benefited from his teachings and I believe that I have become a better person. After that through the Society's activities a group of society members, including Mr Tan started to visit other Buddhist temples to share the teachings. From the activities, I noticed that Mr Tan was committed to the temple activities; I observed that he is a good and kind man and not a calculative person. In this group of students, 4 of us became good friends with Mr Tan. We started to share personal life experiences and we became much more trusting each other.
>
> 3 What happened next?
>
> During the Chinese New Year celebration in early February 2011 as members of the society went visiting other temples and had a lot of activities for the New Year celebration, Mr Tan shared with me that his cash flow was tight and asked me whether I could lend him some money. I had some money and after Chinese New Year was over, I handed over RM5,000/= to Mr Tan as a loan. Mr Tan gave me a note to confirm the loan. I have a copy of the note with me. After that he took further loans from me on 2.4.2012, 13.5.2012, 20.6.2012 and on 9.7.2012. Mr Tan repaid RM2,000/= to me on 24.5.2011. The balance loan sum is RM30,000/=.
>
> 4 Then what happened next?
>
> In February 2013, Mr Tan approached the 4 of us in the group who are close to him, Mr Lee Choon Kuen, Mdm Leong Fook Chin, Mdm Lee Li Foon and myself and said to us that he was tired of running his businesses and wanted to sell off his properties and he offered us to buy because he owes the 4 of us money from personal loans given to him. He proposed that from the 5% of the deposit we could contra a portion of his personal loans to us. Since the 4 of us are friends from the Buddhist Society but are not related to each other, we decided to get a shell company to buy

the properties. We purchased Dazzling Oscar Sdn Bhd on 5.3.2013 when the original shareholders sold their shares to Mdm Leong Fook Chin and Mdm Lee Li Foon. I became the company's director together with Mr Lee Choon Kuen on 5.3.2013 and became shareholders of the company with Mr Lee Choon Kuen on 18.11.2013. The company was formed on 5.2.2013. I have the company's documents here.

5 What are the terms to buy the properties?

Mr Tan offered us to buy 4 of his properties, a shoplot at No 73 & 75, Jalan Raja Muda Abdul Aziz in KL at RM1,100,000/=, another property in the same road at No 61 at RM700,000/=, a double storey corner lot house in Taman Kepong at RM500,000/= and a piece of 3 acres land in Raub, Pahang at RM200,000/=. The Raub land deal has been completed and transferred to Dazzling Oscar on 20.9.2013.

6 Was there any written agreement to buy the properties?

Yes, the company appointed a law firm Khor Rafidah to prepare the agreements for Dazzling Oscar Sdn Bhd and I signed the Agreements on 30.4.2013 together with Mr Lee Choon Kuen (refer to Bundle F, page 103 – 150) with the company's seal. Both Mr Lee Choon Kuen and myself were given authority to sign the agreement by Company's Resolution and Directors' Resolution. Mr Tan also signed the Agreement at the same time with us at the lawyer's office. I have all these orginal documents with me.

7 What happened next?

The law firm informed me sometime in early June 2013 that caveats have been lodged against the 3 KL properties and immediately I called Mr Tan to find out who was Chin Yoke Yin and he told me it was his wife. I got advise from the law firm and they advised me to give him 6 months to withdraw the caveat so that we can proceed with the buying of the properties. I instructed the law firm to notify Mr Tan by letter. I have the letter with me. After receiving the letter Mr Tan informed the 4 of us that he had a divorce court case with his wife. Then in early August, Mr Tan approached the 4 of us to consider taking over the running of his hotel business in No 61, 73 & 75. So we negotiated and in the end agreed to rent his premises from him and run the hotel business. Both parties agreed that the rental amount to be paid to Mr Tan is RM16,000/= every month and all profits and liabilities of the business would be taken over by the Company from 1st September. We have been running the business since that date till today.

[46] Now, I have perused very carefully the evidence in the witness statement. I find that although there were sale and purchase agreements, in the end the properties were never sold. The most glaring statement made by DW1 is 'Then in early August, Mr Tan approached the 4 of us to consider taking over the running of his hotel business in No 61, 73 and 75. So we negotiated and in the end agreed to rent his premises from him and run the hotel business. Both parties agreed that the rental amount to be paid to Mr Tan is RM16,000/= every month ... '.

[47] Now, I have observed Mrs Lam Wan's conduct in giving evidence. She said that they were and are still renting from the respondent. However, there is no tenancy agreement signed between respondent and the company Dazzling Oscar Sdn Bhd. So, my conclusion is that there is a 'pretended' sale and a 'pretended' tenancy. This was done to reduce the matrimonial assets to be divided when divorce is granted.

[48] Hence, I am of the opinion that those properties are matrimonial assets.

[49] Before I make my order, I would like to state the cross-petition by the respondent cannot be dealt with because he chose not to give evidence as regards all the allegations made by him. Lam Wan was only as regards the four properties. For the rest of the claim, there is no evidence led.

[50] For all the above reasons, I am making the following order:

(a) that the marriage may be dissolved and for the decree nisi for divorce to be made absolute immediately;

(b) that the petitioner be given sole guardianship, custody, care and control of Tan Hwee Yeing (NRIC No 990426–14–5342);

(c) that the respondent be given reasonable access to Hwee Yeing subject to the wishes of Hwee Yeing;

(d) that the respondent shall pay Hwee Yeing maintenance of RM1,500 per month from February 2013 until she reaches the age of 18;

(e) that the respondent shall pay petitioner maintenance of RM4,000 per month from February 2013 until she dies or remarry;

(f) that the petitioner shall be entitled to half of all the matrimonial assets held in the respondent's name less any loans to banks, if any, as follows:

f(i) the property known as Lot 11542, GRN 73964, Mukim Batu, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing postal address No 2, Jalan 8, Taman Kepong, 52100 Kuala Lumpur (the matrimonial home);

f(ii) the property known as Lot No 1488, Seksyen 41,GRN 44216, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing postal address No 61, Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur (No 61);

f(iii) the property known as Lot 2531, Seksyen 41, GRN 68082, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing postal address

No 73 and 75, Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur (No 73 & 75);

f(iv) the property known as Lot 1837, GM 2968, Mukim Gali, Daerah Raub, Pahang Darul Makmur (Tempat: Sempalit) (Lot 1837);

f(v) the 4 sale and purchase agreements all dated 30 April 2013 in relation to the matrimonial home, No 61, No 73 & 75 and Lot 1837 be set aside. Thereafter those said properties shall be sold by auction within 90 days from the date of this Decree and the net proceeds of the sale shall be divided equally;

f(vi) the property known as Lot 48701, PN 22319, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur bearing the postal address of No 31, Jalan 9/18A, Taman Mastiara, Off Batu 5, Jalan Ipoh, 51200 Kuala Lumpur (No 31);

f(vii) half of the respondent's half share of the property known HS (M) 3070, PT 2532, Mukim Gali, Daerah Raub, Negeri Pahang Darul Makmur (Lot 2532);

f(viii) the property known as Lot 2981, GM 220, Mukim Tras, Daerah Raub, Negeri Pahang Darul Makmur (Tempat : Sungai Kenong) (Lot 2981);

f(ix) that parties are to jointly appoint a reputable firm of valuers to value No 31, Lot 2532 and Lot 2981, and petitioner and respondent shall bear the total costs of the valuation equally. Each party shall pay their equal share of the total costs directly to the appointed valuer within 14 days of the invoices being sent to them or their respective solicitors;

f(x) half of the respondent's share in the business and / or shares in New Merdeka Hotel (New Merdeka Hotel shares);

f(xi) half of the respondent's share in the business and / shares in Hotel Tiara (Hotel Tiara shares);

f(xii) half of the respondent's share in the business and / or shares in Asrama Megaria (Asrama Megaria shares);

f(xiii) that both parties appoints a reputable firm of valuers to value the New Merdeka Hotel shares, the Hotel Tiara shares and the Asrama Megaria shares and petitioner and respondent shall bear the total costs of the valuation equally. Each party shall pay their equal share of the total costs directly to the appointed valuer within 14 days of the invoices being

sent to them or their respective solicitors;

f(xiv) half of the net proceeds of the sale of old rubber trees on four pieces of land in Raub, Pahang in 2007 amounting to RM76,500;

f(xv) the sum of RM160,000;

f(xvi) half of the value of the AIA insurance policy number 100523303–05 where the assured is the respondent but already cashed out by him;

f(xvii) half of the value of the AIA insurance policy number 10350389 where the assured is Tan Hwee Neng but already cashed out by the respondent;

f(xviii) half of the value of the Great Eastern Life insurance policy number 0083961523 where the assured is the respondent but already cashed out by him;

f(xix) half of the total balance of the amount in the respondent's EPF money from 9 April 1988 until the date the respondent withdrew it;

f(xx) damages for the acts of domestic violence perpetrated by the respondent against the petitioner in the sum of RM4,000;

f(xxi) that the ringgit value of all matrimonial assets ordered to be payable by the respondent to the petitioner shall be paid within 120 days from the service of this Decree on him or his solicitors;

f(xxii) that sum of RM168,750 held by Queensdale Sdn Bhd being the amount due to the respondent shall be paid to the petitioner within seven days of the service of this Decree to Queensdale Sdn Bhd. This said RM168,750 shall be deducted from the overall amount to be paid by the respondent to the petitioner as ordered herein;

f(xxiii) that the sum of RM56,250 held by Queensdale Sdn Bhd belonging to the petitioner shall be released to her within seven days from the service of this Decree to Queensdale Sdn Bhd.

(g) Each party to pay it's own costs.

Order accordingly.

Reported by Kanesh Sundrum